

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

75-7700

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

GEORGE HANZIMANOLIS,

Plaintiff-Appellant,

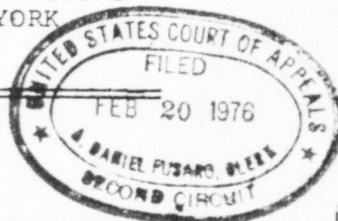
-against-

MICHAEL J. CODD, as Police Commissioner
of the City of New York,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S BRIEF



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7700

GEORGE HANZIMANOLIS,

Plaintiff-Appellant,

v.

MICHAEL J. CODD, as Police
Commissioner of the City
of New York,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of New York

BRIEF OF THE APPELLANT

QUESTION PRESENTED

Were the issues presented in the within action raised
or could they have been raised in the State Courts previously
thereby precluding the plaintiff from raising them again due
to the doctrines of res judicata or collateral estoppel?

STATEMENT

Prior to August 9, 1971, the plaintiff was a police officer with the Police Department of the City of New York, in good standing.

On August 9, 1971, the plaintiff was charged by the Police Department with five violations of the Rules and Procedures of the Police Department of the City of New York (A- 50).

On May 12, 1971, the plaintiff was suspended from all duties as a patrolman, without pay, pending a departmental hearing of the charges.

On June 21, 1972, and July 11, 1972, the Departmental Disciplinary Hearing was held before Deputy Commissioner LOUIS L. STUTMAN, the trial officer.

That during the disciplinary hearing and apart from the record of the hearing, HAROLD B. FONER, Esq., the attorney who represented plaintiff at that hearing had entered into an agreement with the Hearing Officer, Deputy Commissioner STUTMAN, in which the plaintiff actually pleaded guilty to said charges and it was agreed that the only punishment for the plaintiff would be a thirty-day suspension from the job without pay.

Sometime thereafter, and before November 8, 1972, Deputy Commissioner STUTMAN refused to consummate the agreement and permitted the plaintiff to withdraw his plea of guilty and proceeded on with the hearing.

On November 8, 1972, Deputy Commissioner STUTMAN issued his Findings, Rationale, and Recommendation in the form of a Memorandum.

dum (A-55).

The following day, on November 9, 1972, Hon. PATRICK V. MURPHY, then Police Commissioner, issued a Final Order of Dismissal (A-61).

Thereafter an Article 78 Proceeding was commenced in the Supreme Court, New York County, which was referred to the Appellate Division, First Department. The Appellate Division, First Department unanimously affirmed the decision of the Police Commissioner, without opinion.

Plaintiff then appealed as of right to the New York State Court of Appeals on the grounds that plaintiff's Federal and State constitutional rights were violated. Plaintiff's appeal was dismissed, after motion by the defendant, on the grounds that no substantial constitutional questions were raised and without further opinion.

Thereafter, plaintiff sought leave to appeal to the Court of Appeals and said leave was denied by both the Appellate Division, First Department, and the New York State Court of Appeals, all without opinion.

Thereafter, plaintiff petitioned the Supreme Court of the United States for a Writ of Certiorari. The Supreme Court denied the Writ of Certiorari, without opinion.

Thereafter, plaintiff commenced the within proceeding. Among plaintiff's allegations in the Amended Complaint of the with-

in proceeding was that at the time of the Hearing, the plaintiff's attorney entered into a disposition with the Hearing Officer of all of the charges, which disposition was to allow the plaintiff to plead guilty to said charges and his only punishment would be a 30 day suspension from the job without pay. (A- 8)

Plaintiff further alleged that the same Hearing Officer arbitrarily refused to complete the disposition which was agreed to, without reason or cause stated, and the plaintiff had to withdraw his plea of guilty and proceed with the hearing. The plaintiff further charged in his Amended Complaint, also for the first time that the Hearing Officer and the Police Department "used the aforementioned charges and resulting hearing as a subterfuge, a deception and artificial justification for the discharge of the plaintiff from his Civil Service position, all under color of law (A- 8).

The District Court, on motion by the defendant, dismissed the Complaint. It held that the plaintiff "may not re-litigate the very same issue in this Court by asserting a claim under the Civil Rights Act."

Plaintiff contends that the District Court erred in dismissing the Complaint in that the issues raised by plaintiff are not the same issues that were previously litigated and that this was plaintiff's first opportunity to litigate the allegations complained of herein.

ARGUMENT

THE PLAINTIFF HAS NOT RAISED THE SAME
ISSUES IN THE STATE COURT PROCEEDING,
NOR COULD HE HAVE DONE SO.

Plaintiff submits that his cause of action herein
arose as soon as the Deputy Commissioner (Hearing Officer) issued
his Memorandum (A- 38) to the following effect:

"There is an obvious suspicion that the
respondent herein was involved in the homicide
of Dr. Shapiro, but apparently there is no
proof that he was responsible for his death."

This Memorandum was issued after the Departmental
Hearing had concluded and could not be reopened but could
merely be reviewed in the Article 78 Proceeding that followed
thereafter. The evidentiary record had already been made.

The Departmental Hearing was the last evidentiary
forum held until the Civil Rights Proceeding herein was commenced.
Since the Departmental Hearing was already closed, and could
merely be reviewed, the Civil Rights Acts trial would have
furnished plaintiff his first opportunity to examine and cross-
examine the Hearing Officer and other members of the Department,
as well as obtain pre-trial disclosure and depositions necessary
for such trial.

In the case of LOMBARD v. BOARD OF EDUCATION OF CITY
OF NEW YORK 502F, 2d 631 (1974), the Court said as follows:

"There may have been a number of reasons why Lombard was dismissed without determination on the merits of the issue whether Murphy's charges were based upon bias or even reprisal. The failure to put Murphy on his oath and to permit Lombard to cross-examine him tends to support the conclusion that a finding on Murphy's bias was not necessary to the decision that Lombard was mentally unfit."

The Article 78 Proceeding was a review held by the Supreme Court, Appellate Division, First Department, an appeals Court. The matter was next brought to the New York Court of Appeals, a Court also of Appellate Jurisdiction. The Petition for Certiorari was brought to the Supreme Court of the United States, also an Appellate Court.

The District Court action herein was the first evidentiary forum wherein plaintiff could litigate those charges contained in the within Amended Complaint.

The issues litigated before in the State Court proceeding, (A- 32-40), were constitutional issues concerning the procedures, rationale, and evidence presented by the Police Department against the plaintiff based on a record of evidence presided over by the Police Department Hearing Officer.

In the within action, the plaintiff contends that the Police Department and its Hearing Officer (A- 7-9) did not act in good faith. The Police Department could not have taken evidence against itself. Only another Trial Court could have done so and in this case, it was and could only be the District Court.

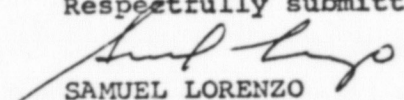
It is true, that plaintiff could have bypassed the State Courts, and not bring his Article 78 review and gone directly into the District Court on the questions presented herein. However, that would have meant that plaintiff would have lost forever his right of review based on the evidence which the Police Department said they had obtained at its hearing, since there was a 120 day Statute of Limitation for the Article 78 Proceeding which would not have been held in abeyance by the District Court action.

The plaintiff submits that the constitutional issues presented in the Civil Rights action are not the same as those already litigated in the State Courts and that the District Court action was the first opportunity that plaintiff had to litigate the constitutional issues raised in the District Court. Therefore, the doctrines of res judicata and collateral estoppel do not apply herein.

CONCLUSION

The judgment of the Court below should be in all respects, reversed.

Respectfully submitted,


SAMUEL LORENZO
Attorney for Plaintiff-Appellant
401 Broadway
New York, New York 10013

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JEFF ELYSHEVITZ, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 90-19 88th AVE
WOODHAVEN, N.Y.

That on the 20th day of FEBRUARY, 1976,
deponent personally served the within PLAINTIFF-APPELLANT'S
BRIEF
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

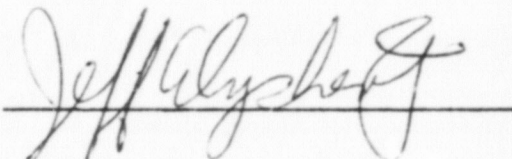
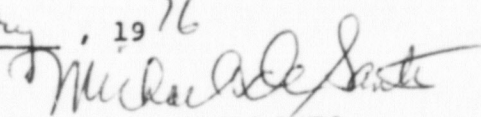
~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

W. BERNARD RICHLAND
CORPORATION COUNSEL
ATTORNEY FOR DEFENDANT-APPELLEE
MUNICIPAL BLDG.
NEW YORK, N.Y. 10007

Sworn to before me this

20th day of February, 1976

MICHAEL DeSANTIS
Notary Public, State of New York
No. 010930908
Qualified in Bronx County
Commission Expires March 30, 1977



